IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 479 of 2002

with

SPECIAL CRIMINAL APPLICATION No 865 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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KAMDHENU FINANCIAL SERVICES PVT.LTD.

Versus

STATE OF GUJARAT

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Appearance:

1. Criminal Revision Application No. 479 of 2002
   MR S V RAJU WITH
   MR CHETAN K PANDYA for Petitioner No. 1
   MS NANDINI JOSHI APP for Respondent No. 1
   MR ZUBIN F BHARDA for Respondent No. 2
2. Special Criminal Application No. 865 of 2002
   MR S.V.SAJU ADVOCATE WITH
   MR CHETAN K PANDYA for Petitioner No. 1
   MS NANDINI JOSHI APP for Respondent No. 1

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CORAM : HON'BLE MR.JUSTICE C.K.BUCH

Date of decision: 04/03/2004

ORAL JUDGEMENT

1. Heard Mr. S.V.Raju learned counsel with Mr.Chetan Pandya learned counsel on behalf of the petitioner, Ms. Nandini Joshi learned APP for the respondent State and Mr. Zubin Bharda for respondent no.2 in Cri.Revision Application No. 479 of 2002.

2. Present Criminal Revision Application No. 479 of 2002 is preferred to get the order set aside passed by the learned Additional Sessions Judge, Surat dated 16.11.2002 while disposing of the Criminal Revision Application No.284 of 2002.

3. The order under challenge is a common order passed while dealing with two Criminal Revision Applications viz. Criminal Revision Application No. 240 of 2002 and 284 of 2002.

4. Criminal Revision Application No. 240 of 2002 was filed by the present petitioner and the second one by respondent no.2 of the present Revision Application viz. Navinchandra Dhirajlal Gandhi.

5. Today, the two matters are listed for final hearing as different proceedings. One of them is, a Special Criminal Application No. 865 of 2002 invoking jurisdiction of this court under section 482 of the Cri.Proc. Code. It is submitted that the Criminal Revision Application preferred by the petitioner came to be dismissed by common order under challenge, Special Criminal Application has been filed to avoid technical objection and the present Criminal Revision Application No. 479 of 2002 is filed because the relief prayed for by the present respondent-Navinchandra, in Criminal Revision Application No.284 of 2002, has been granted in his favour simultaneously.

6. For the sake of convenience it would be proper to set out the facts in brief, which go to the root of the dispute brought before this court.

6.1. The petitioner is a finance company and had filed a complaint No 514 of 2001 in the court of learned JMFC, Surat against the respondent no.2 Navinchandra Dhirajlal Gandhi for committing offences punishable under sections 406,408,420,423 and 463 of the Indian Peeenal Code . After recording verification, the learned JMFC took

cognizance and issued process. It is contended that upon the request of the accused and on a representation made by the accused, the vehicle in question i.e. Daewoo Ceilo Nexia Car having registration NO. GJ-7-R-3797, was handed over to the respondent no.2 because of one of the terms and conditions laid down in the Hire Purchase Agreement (for short H.P.Agrement) executed by the accused on 24.2.2001.

6.2. The respondent no.2, under the said HP agreement was under an obligation to pay the amount/instalment and in that terms of the HP agreement, the vehicle was handed over to the accused. On realizing that the petitioner company is being cheated as the cheques given by the accused were bounced for insufficient funds in the relevant bank account, above said complaint was filed. The petitioner also filed an application under section 93 of Cr.P.C. being Cri.Misc.Application NO. 49 of 2002 inter alia prayed for issuance of a search warrant to the Police Inspector,Salabatpura Police Station to seize the above said motor car and after hearing the complainant-applicant, the learned Magistrate passed orders for issuance of warrant and seizure of the car in question. But before the motor car could be handed over to the petitioner on further orders, respondent no.2 raised objections and submitted that custody of the vehicle in question may be restored to him as he was enjoying possession of the motor car under a contract as a registered owner and there is bonafide dispute as to the terms and amount of payment. As per Mr. Bharda order under section 93 Cr.P.C. was not legal or proper.

7. I have considered the contentions of respondent no.2 before the court. The prayer to hand over the vehicle to the petitioner company advanced before the learned Magistrate has been rejected vide order dated 3.7.2002. In the same way, application of the similar nature i.e. for getting custody of the vehicle in question moved by the respondent no.2. Navinchandra Dhirajlal Gandhi( accused-applicant) also came to be rejected on that very day.

8. Feeling aggrieved by the order passed order dated 3.7.2002, both the contesting parties approached the Sessions Court by moving Criminal Revision Applications and prayed for the similar relief that the custody of the vehicle pending trial of the criminal case, be entrusted to them, pleading their own ground in the memo.

9. The decision-common order allowing the Criminal Revision Application of respondent no.2 and rejecting the

say of the original complainant-finance company has given rise to both these pending proceedings.

10. The say of Mr. Bharda learned counsel is that the petitioner company has attempted to misuse the process of the court. The finance company could have taken over the custody of the vehicle in question under the HP Agreement. There was no need to brand the respondent as cheater or a person offender of criminal breach of trust. Many installments have been paid and when there was no offences of either cheating or criminal breach of trust , there was no need for the petitioner company to file a criminal complaint or to move an application for seizure of the vehicle in question under section 93 Cr.P.C. Therefore, pending hearing and final disposal of the criminal case the custody of the vehicle in question should be handed over to him, as per terms and as he is the registered owner.

11. Undisputedly, respondent no.2 is the registered owner and from his custody the police has seized the vehicle. In response to a query raised by the court, MR. Bharda has submitted that the petitioner company can take away the vehicle from the custody of the present respondent no.2, but the action of resorting to criminal proceedings may not be in any way held to be justified by this court.

12. Mr. Raju, in response to the resistance by respondent no.2, has attempted to clarify that under the HP agreement, the owner financier as per the terms, is entitled to the custody of the goods under the agreement and if any attempt to get the custody of such goods is made, legitimate or reasonable use of force does not amount to any criminal offence. It is not a matter of dispute that the vehicle was handed over to the respondent no.2 under the HP agreement and on account of payment of instalments/amount, as agreed, but are not paid to the petitioner. Default in making payment whether has given rise to a criminal wrong or civil wrong is a matter of scrutiny during trial. Issuance of process can be said to be the acceptance of prima-facie existence of a triable case placed by the complainant .

13. In the case of Charanjit Singh Chadha and ors. vs. Sudhir Mehra reported in (2001) 7 SCC 417, the Apex Court has observed that

" Hire purchase agreements are executory contracts under which the goods are let on hire and the hirer has an option to purchase in

> accordance with the terms of the agreement. These types of agreements were originally entered into between the dealer and the customer and the dealer used to extend credit to the customer. But as hire-purchase schemes gained in popularity, the dealers who were not endowed with liberal amount of working capital found it difficult to extend the scheme to many customers. Then the financiers came into the picture. The finance company would buy the goods from the dealer and let them to the customer under hire-purchase agreement. The dealer would deliver the goods to the customer who would then drop out the transaction leaving the finance company to collect installments directly from the customer. Under hire-purchase agreement, the hirer is simply paying for the use of goods and for the option to purchase them. The finance charge, representing the difference between the cash price and the hire-purchase price, is not interested but represents a sum which the hirer has to pay for the privilege for being allowed to discharge the purchase price of goods by installments."

14. After referring to the two decisions i.e. Instalment Supply (P) Ltd. vs. Union of India, reported in AIR 1962 SC 53 and Sundram Finance Ltd. vs.State of Kerala AIR 1966 SC 1178, the Apex Court has observed that the possessor of the agreement executed by the parties, the hirer would not become the owner of the property until he pays the entire instalment. So even as per the RTO records, the ostensible i ownership is with somebody or say the hirer, the goods under the HP agreement would remain under the ownership of the financier as per the terms of HP agreement.

15. It is not even accepted or observed by the learned Sessions Judge that irrespective of execution and existence of the HP agreement and the default in payment, respondent no.2 is entitled to custody of the vehicle in question because there are other special circumstances. A financier has a right to receive/get possession even if the HP agreement does not contain a clause of resumption of possession and it was brought to the notice of the learned Sessions Judge that the complaint against respondent no.2 came to be filed after bouncing of more than one cheques issued to the finance company by respondent no.2. It is true that normally pending trial the muddamal property should be handed over to the person from whose custody it is taken-seized. But there are

certain exceptions to this general proposition of lawand the case of the present petitioner company falls in the category of one of such exceptions.

16. It is rightly argued that the ratio of the decision in the case of Satpalsingh Ajitsingh Bajaj vs. Kalyani Trading Co. through its partner Sunilbhai D. Kalyani & ors. reported in 2001(3) GLR 2243 would help the present petitioner, wherein this court was dealing with the question of interim custody of a vehicle, in a criminal revision application wherein an order was passed in exercise of the jurisdiction vested with the trial court under section 451 of Cr.P.C.holding that the interim custody of the vehicle should be given to the financier and not to the person whose name is found as owner in RTO records.

17. A pointed question was asked to Mr. Bharda in light of the submissions made by him that whether this court, even if it is accepted that the petitioner company could have obtained the custody or possession of the vehicle in question from respondent no.2 from his residence and not by misusing the powers of the court, can direct the respondent no.2 to hand over the vehicle in question to the finance company as the respondent no.2 was under an obligation as per the agreement not to retain possession being a defaulter. But the court has not received any convincing reply. The court finds that the submissions advanced by Mr. Bharda are merely technical, the same has some logic but on facts there is no substance unless the court is not able to record finding that the dispute is absolutely of a civil nature and the financier has a little scope of success.

18. The learned Sessions Judge has not appreciated the facts in the light of the relevant law applicable and/or terms of the HP agreement available on record. When the learned Magistrate has passed an order of seizure of the vehicle in question, on merits, while dealing with the application under section 93 of Cr.P.C. he ought to have accepted the request made by the petitioner company at the initial stage. But the learned Magistrate committed a serious error in rejecting both the applications i.e. application of the petitioner company as well as the application preferred by the registered owner ignoring resultant effect. No Special reasons are offered for keeping the vehile with the court. A valuable vehicle unnecessarily is lying with the police and the value of the vehicle is getting deteriorated day by day. The learned Magistrate ought to have appreciated one aspect that the vehicle in question

needs to be handed over atleast to one party so that the same can be maintained in good shape and condition till the disposal of the case and final order on muddamal. So both the courts below have committed error of law as well as jurisdiction. When discretion is required to be exercised then the same should be exercised in the light of the facts available on record and the law applicable to the facts of the case. Balanced and objective appreciation is only importrant arm where discretionary decision is called for.

19. It is true that ordinarily when any property such as motor vehicle is attached or seized by the police or is produced before a court in compliance of the warrant issued by the court under section 93 of Cr.P.C., one has to consider the effect of the provisions of Motor Vehicles Act (MV Act for short) for finding out the claimant. The provisions relating to registration of motor vehicles, if seen, it is clear that registration and issuing of registration certificate are essential for any such motor vehicles , before it is put to use that any person in whose favour such a certificate of registration is issued, obviously, the registered owner . It would ordinarily be prudent and in consensus with the provisions of MV Act. Until, transfer of ownership, is entered in the certificate of registration,in accordance with relevant rule, the person in whose favour such certificate of registration is issued, is the owner and entitled to possession of the said vehicle. But in the light of scheme of sections 48,50 and 51 of the MV Act, this ordinary principle would not help a third person claiming to be the bonafide purchaser with value without notice against a financier having written HP agreement executed in its favour by purchaser in whose favour/benefit the finance has been disbursed. Same is the case under lease agreement or hypothecation agreement. In the present case, the say of the petitioner company is that the vehicle in question has been financed by it and there is a clear agreement between the company and the registered owner. So, unless the amount is paid, and formality of transfer of vehicle is concluded, the registered owner would remain only ostensible owner. The case of such owner would be on a better footing against a third party when genuineness of No Objection Certificate, required to be issued under section 48 of MV Act or a deed of transfer is under serious dispute; but not against a financier - the real owner of the vehicle.

20. In this connection, the observations made by this court in the case of Nandiram @ Nandumal Parumal vs.

State of Gujarat & ors. 7 GLR page 866 and the ratio of the decision on the case of Shantilal Mohanlal vs. Aher Bhavanji Maldev reported in 1985(1) GLR 465 (FB) need consideration. As held by this court in the case of Shantilal (supra), the provisions as contained in Sale of Goods Act would apply in the case of transfer of motor vehicle. So when naturally, ostensibility is pleaded for the custody of the vehicle before the court or the police in a criminal offence, the question of real ownership should be examined because the real ownership is acquired by the purchase of exclusive ownership and ownership as per certificate of registration are two different aspects. A registered owner under a HP agreement has to pay the full amount of consideration or agreed amount under hire purchase/hypothecation agreement as the case may be to become exclusive real owner. It seems that the learned Trial Judge has not applied the facts and law in the correct perspective and this is the error needs rectification.

21. Whenever a clear malafide or such oblique motive in a commercial transaction or financial matters by any act or omission, delivers a criminal wrong, then it should be viewed with sensitivity and different angle ; otherwise the value based normative behavior which is the back bone of such transaction, would sustain a great damage. So while passing order in such or similar matters, especially when the court is asked to exercise discretion, it becomes obligatory on the part of the court also to see that a person who is a wrong doer, is not put to an advantageous position; otherwise it may carry wrong signal to the society. So the finding of the learned Trial Court should be set at naught.

22. For short, the contentions raised by the petitioner company are required to be accepted and the order passed by the learned Sessions Judge granting Criminal Revision Application NO. 284 of 2002 is required to be quashed and set aside . So the order dated 3.7.2002 passed by the learned Magistrate rejecting the application of the respondent no.2 requesting the custody of the vehicle in question is required to be accepted. It is clarified that the ultimate finding is found correct.

23. Hence Criminal Revision Application No. 479 of 2002 is allowed. By way of interim arrangement of possession the vehicle in question be handed over to the petitioner company pending hearing and final disposal of the criminal complaint No.514 of 2002 and the company shall keep the said vehicle in a good condition and if

the company intends to exercise its right under the HP agreement, executed by respondent no.2 then such right shall be exercised after obtaining appropriate orders from the competent court including trial court. The interim custody of the vehicle shall remain subject to the further orders that may be passed by the competent criminal court. Rule is made absolute in the aforesaid terms.

Special Criminal Application No.865 of 2002

24. Ms.Nandini Joshi learned APP for the respondent State submitted that this application is not maintainable. On the other hand, the say of Mr. Raju is that in light of the decision of the Apex Court reported in (1997) 4 SCC 241 in the case of Krishnan and anor. vs. Krishnaveni & anor. the petition is sustainable. Mr. Raju has also placed reliance upon the decision of a case reported in 2002 AIR SCW 5301 in the case of Sunderbhai Ambalal Desai vs. State of Gujarat . In the light of the ratio of the decision of the Apex Court reported in AIR 1997 SC 987 an application under section 482 Cr.P.C. is maintainable. But as per decision cited by Ms. Joshi in the case of Rajathi vs. C.Ganesan reported in AIR 1999 SC 2374 by referring the decision of Krishnan (supra) it is held by the Apex Court "that inherent powers under section 482 Cr.P.C. was wrongly exercised by the High Court though the dispute was already decided by the court."

25. It is not necessary to enter into the larger question posed before the court observing that no formal order is required to be passed in this petition in light of reasons assigned and the orders passed by the court while dealing with Cri.Revision Application No. 479 of 2002. Thus without passing any formal order, this petition is treated as disposed of. Order accordingly. Rule discharged. DS.

(C.K.Buch-J)

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